



## The Israeli Law Professors' Forum

### For Democracy

#### Summary of Position Paper No. 10: When Do the Proposed Regime Changes Go Into Effect?

Published 12 February 2023\*

The Israeli Law Professors' Forum for Democracy, an ad hoc, apolitical, and voluntary group of experts on Israeli law and specifically Israeli public law, expresses its grave concern over the apparent intention to abolish the independence of the judiciary, to subordinate it to the government and to the partisan political considerations of the executive branch, and to undermine the independent status of the attorney general legal advisers to the government and to governmental ministries. Following Position Paper No. 9 on the Knesset's authority to amend basic laws, this Position Paper examines the restrictions on approving amendments to Basic Laws and focuses on the question of when such changes go into effect under law. **The conclusion of this Position Paper is that the proposals for amending Basic Law: The Judiciary constitute an abuse of power, in light of the clear conflict of interest for the majority coalition. Therefore, even without addressing the question of whether the proposed changes harm the core values of the State of Israel—and in our opinion they do—at a minimum, the proposed changes should only go into effect beginning with the next Knesset.**

In short: There are two central elements regarding the question of limitations on the power to change Basic Laws. The first is the content of the change: Does the change contradict the essence

---

\* We, members of the Israeli Law Professors' Forum for Democracy, hold different academic views regarding the details of the various reforms proposed by Israel's 37th Government to change Israel's democratic regime. However, we are united in the opinion that the entirety of the government's proposals - which are an unprecedentedly severe attack on the independence of the judiciary, the Attorney General and government legal advisers, the police, the military, and public broadcasting - will seriously damage the rule of law and Israel's democratic character. Therefore, we created this forum to make our professional opinion available to the public at this fateful time. The position papers or other professional materials produced by us reflect the prevailing position among the members, even if they are not unanimous. The list of Forum's members and all position papers on our behalf are available at [www.lawprofs.org](http://www.lawprofs.org). Follow us on Twitter: <https://twitter.com/lawprofsforum>. Contact us: [lawprofessorsforum@gmail.com](mailto:lawprofessorsforum@gmail.com).

of the basic values of the State of Israel as a Jewish and democratic state, as anchored in the Declaration of Independence? In legal terms, this question assesses whether the constitutional amendment is, itself, constitutional. The forum's Position Paper No. 9 discusses this question. The second element examines two questions: First, can the Knesset use Basic Laws to regulate any topic, including topics that are more suitable for regular legislation, and perhaps even regulations? Second, is the Knesset authorized to amend a Basic Law, changing the democratic rules of the game, and for that amendment to go into effect immediately? Or can the amendment only come into effect beginning with the inauguration of the next Knesset, thus preventing the Knesset that changed the rules from being the first Knesset to play according to the new rules? These two questions relate to what we call "the abuse of the governing entity's authority," which entails that there may be situations in which the Knesset uses its authority to pass Basic Laws in an improper way.

The starting point for discussion is that a basic goal of every constitutional framework is to prevent a situation in which a contingent or random majority changes the basic rules of the game, and then uses the new rules to take control over the structural elements of that framework, or to gain a built-in advantage in every future encounter with the minority. Therefore, the foundational insights of constitutional law are based on two complementary principles: (1) A significant change of the rules of the game requires broad cross-party agreement in the legislature, and not only of the coalition majority, and (2) A change in the rules of the game that are relevant to the relationship between the majority-minority, or to the removal of limits on the power of the majority, will only take effect from the next Knesset. And in legal terms: The change will take effect with a delayed start, beginning with the next election.

**This Position Paper demonstrates that the changes now being advanced by the coalition are a clear case of abuse of their legislative authority. The proposed amendments change basic elements in the rules of the game—elements that are meant to put limits on the majority.** And now, the majority in the Knesset is seeking to remove these limitations (without replacing them with other limitations) and immediately use its unchecked power to change the reality for the long term. Another way to describe it is through noting the built-in conflict of interest embedded in the proposed changes: The majority aspires to use its power to amend Basic Laws, that are meant to limit the majority when legislating regular laws, or when it comes to exercise its authority given through these laws. In simple terms, the majority encounters the brakes that are supposed to prevent the cat from eating the cream, uses its power to remove these brakes without broad agreement, and then, immediately, goes ahead and eats as much of the cream as it desires.

Specifically, the process of selecting judges in Israel is based on an agreement obtained in 1953, according to which the majority coalition will not enjoy automatic control over the Judicial Selection Committee. This agreement rested on the understanding that if the majority has such power, it will appoint judges according to its own tastes—judges from its camp that will not interfere with its actions. This would be opposed to the basic role of judges—to ensure that the ruling power abides by the law and the basic principles and does not harm human rights beyond what is necessary. Similarly, the majority now proposes that all Basic Laws will be entirely immune from judicial review. This would apply without setting limits on the topics appropriate

for Basic Laws, without setting requirements for a special process for legislating Basic Laws, and in general leaving this whole issue to the majority's will. This entails that the coalition majority, after having removed existing limitations on the legislation of Basic Laws (as developed through court rulings) will be able to enact any Basic Law it desires, and thus overcome any limitation. Here too, the cat takes away any limitation on itself, and can easily eat the cream—enacting any Basic Law it wishes—in a way that is likely to blatantly affect the relationship between majority and minority. And the court—according to the majority's wishes—cannot conduct any judicial review. It should be noted that Basic Laws, and especially Basic Laws concerning the system of government, were traditionally legislated with the agreement of legislators from all different parties and did not rely solely on the majority coalition. The current majority does not comply with the accepted practice, and does so in an accelerated manner.

The abovementioned analysis is relevant to two additional proposals: A change in the status of public service legal advisors and their selection process, and granting authority to the coalition majority to pass a law that contradicts a Basic Law by use of the 'override clause' (and by a majority of only 61). Public-service legal advisors are also part of the mechanism that constitutes checks on the majority rule, and transforming them into a political appointment and making their opinions not binding removes an additional barrier between the cat and the cream. Even giving the majority the authority to overturn a court ruling that a law is not constitutional—or granting power to make a law immune from judicial review at the outset—through the use of the override clause, frees the majority from an important balancing mechanism. As long as the override clause has general application, and cancels any limitations provided under the constitutional framework, and is not limited to specific contexts, the cat will have unlimited access to the cream.